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MAY 07 2007

**OFFICE OF PETITIONS**

In re Application of : DECISION ON PETITIONS  
Wilkerson et al. :  
Application No. 10/678,335 :  
Filed: 10/03/2003 :  
Attorney Docket No. EMPATHY :

This is a decision on the petition under 37 CFR 1.181, filed July 14, 2006, to withdraw the holding of abandonment. This is also a decision on the petition under 37 CFR 1.137(b), filed March 5, 2007, to revive the above-identified application.

The petition under 37 CFR 1.181 is dismissed.

The petition under 37 CFR 1.137(b) is granted.

This application became abandoned for failure to submit corrected drawings within the three-month statutory period set forth in the Notice of Allowability, mailed on April 25, 2003. Specifically, the Notice of Allowability stated that corrected drawings (as "replacement sheets") must be submitted, including changes required by the Notice of Draftsperson's Patent Drawing Review (PTO-948) attached to Paper No./Mail Date November 3, 2004. As no reply was received, the application became abandoned on July 26, 2005. A Notice of Abandonment was mailed on April 6, 2006.

**Petition under 37 CFR 1.181**

In essence, petitioner asserts that no response to the Notice of Allowability was required because corrected drawings had been filed on April 2, 2004, prior to the mailing of the Notice of Allowability. Petitioner states that Private PAIR shows a correction on April 25, 2006, indicating drawings were not required. Petitioner submits a copy of the Private PAIR report with the present petition.

Petitioner's argument has been carefully considered, but is not persuasive. At the outset, it is noted that there is an entry in PAIR's File History indicating "04-25-2005 Correction – Drawing NOT Required," however, there is no documentary evidence in the official file to support this conclusion. The Notice of Allowability stated that corrected drawings were required and that "Applicant has

THREE MONTHS FROM THE 'MAILING DATE' of this communication to file a reply complying with the requirements noted below. **Failure to timely comply will result in ABANDONMENT of this application.**" (Emphasis added). Petitioner did not respond to the Notice of Allowability by either submitting corrected drawings or presenting an argument that such drawings were not necessary. Rather, petitioner allowed the statutory period to run. The Notice of Allowability clearly stated that a reply thereto was required to be filed, regardless of whether petitioner believed that all of the examiner's requirements had already been fulfilled.

Further, there is no showing in the written record that the examiner agreed that no reply to the Notice of Allowability was required. As MPEP 711.03(c) states, a delay caused by an applicant's lack of knowledge or improper application of the patent statute, rules of practice or the MPEP is not rendered "unavoidable" due to: (A) the applicant's reliance upon oral advice from USPTO employees; or (B) the USPTO's failure to advise the applicant of any deficiency in sufficient time to permit the applicant to take corrective action. See In re Sivertz, 227 USPQ 255, 256 (Comm'r Pat. 1985).

Therefore, the showing of record is that the abandonment resulted from petitioner's failure to respond to the Notice of Allowability, rather than an error on the part of the USPTO. The application was properly held abandoned.

The petition under 37 CFR 1.181 is **DISMISSED**.

**Petition under 37 CFR 1.137(b)**

Petitioner submitted corrected drawings with the present petition. Petitioner has met the requirements to revive the application under 37 CFR 1.137(b). Accordingly, the petition under 37 CFR 1.137(b) is **granted**.

This matter is being forwarded to the Office of Patent Publication for processing into a patent.

Telephone inquiries concerning the issuance of the application into a patent should be directed to the Office of Patent Publication, Customer Service at (571) 272-4200.

Telephone inquiries specifically concerning this decision should be directed to the undersigned at (571) 272-3211.

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